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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1047

THE PROCTER & GAMBLE MANUFACTURING COMPANY,

Petitioner,

v.

THE INDEPENDENT SOAP WORKERS OF SACRAMENTO, CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD W. BARRETT,
JACK G. EVANS,
1200 Union Central Building,
Cincinnati 2, Ohio,
Counsel for Petitioner.

Of Counsel:
GUY FARMER,
PATTERSON, BELKNAP & FARMER,
1120 Connecticut Ave., N. W.,
Washington 6, D. C.,
HAROLD S. FREEMAN,
DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
1200 Union Central Building,
Cincinnati 2, Ohio,

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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THE INDEPENDENT SOAP WORKERS OF SACRAMENTO, CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered herein on February 15, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court printed in Appendix A hereto (*infra*, p. 1a)[1] is reported at 50 L. R. R. M. 2972. The opinion of the Court of Appeals, printed in Appendix A hereto (*infra*, p. 8a) is reported at 314 F. 2d 38.

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[1] "*Infra*" references are to the appendices of this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1963 (*infra*, p. 17a). A timely petition for rehearing, filed on March 11, 1963, was denied on March 21, 1963 (R. I.: 72).[2] The statutory provision conferring jurisdiction on this Court is found at 62 Stat. 928; Title 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the terms of the grievance and arbitration clause of the collective bargaining agreement and the history of its negotiation warrant the Court of Appeals' conclusion, contrary to that of the District Court, that a joint company-union grievance stipulation was not a mandatory condition precedent to arbitration.
2. Whether the above stated conclusion of the Court of Appeals was the consequence of an over-extension and a misapplication of this Court's ruling in the Arbitration Trilogy cases and resulted in a denial of the major premise underlying those cases that arbitration is a matter of agreement.
3. Whether the Court of Appeals exceeded its scope of review under Rule 52(a) by finding contrary to the District Court, that the parties did not intend to make the joint stipulation provision of the contract a condition precedent to arbitration.

STATUTES INVOLVED

The statute involved is Section 301(a) of the Labor Management Relations Act, 61 Stat. 156, 29 U. S. C. § 185(a):

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[2] "R" references are to the volume, page and where necessary the line of the certified record.

> Section 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Rule 52(a) Federal Rules of Civil Procedure is also involved:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Respondent, The Independent Soap Workers of Sacramento, California (hereinafter called the Union), commenced this action in the Superior Court of the State of California. It was removed by the Petitioner, The Procter & Gamble Manufacturing Company (herein called the

Company), to the United States District Court for the Northern District of California, Northern Division, which had jurisdiction under the provisions of Section 301(a) of the Labor Management Relations Act.

The Union sought an order directing arbitration under the terms of the then existing collective bargaining Agreement between the Union and the Company. The Union's motion for summary judgment was denied. Following a trial without a jury before the District Court, the application was denied.

The dispute involved the disqualification on November 21, 1960, of an employee from his job as a tank farm operator at respondent's Sacramento, California, plant as the result of the most recent of several errors he had committed in the performance of his work assignments. He was reassigned to other work. A grievance over the Company's action was processed through Steps 1, 2 and 3 of Article XV(b) of the Agreement without settlement. On December 30, 1960, the Union requested arbitration on the ground that the Company's action was not "proper nor just." The Company declined to arbitrate and declined to enter into a joint stipulation for this purpose, basing its action upon the ground that the dispute did not involve the interpretation or application of any provision of the Agreement.

The Union and the Company had been parties to collective bargaining Agreements at the Sacramento plant since its opening in 1953. Each of those Agreements, including the one existing at the time of the request for arbitration of this dispute, contained the same limited form of an arbitration provision:

> "It is understood that arbitration will be limited to grievance involving the interpretation or application of the provisions of this Agreement. The Company and the Union will stipulate the grievance jointly in

writing and the Board [of Arbitration] will act only on the stipulation and will not add to nor take away from the terms of this agreement in making this decision."

Upon the evidence submitted at trial, including the Agreement, the bargaining history and the testimony of the witnesses, the District Court found that the Agreement requires a joint stipulation of the grievance as a condition precedent to the continued progress of proposed arbitration, but that a joint stipulation is not a required consequence of previous failures to agree on the disposition of the grievance (*infra*, pp. 5a-6a). The finding was based on the contract language, the intention of the parties as evidenced by the bargaining history, and the applicable judicial decisions involving similar issues. The trial court found that "the terms of this particular provision are (and obviously were intended by the negotiations to be) so weak as to render it totally nugatory" (*infra*, p. 6a). These findings were based upon substantial evidence.

The Court of Appeals made different findings, despite the existence of substantial evidence to support the District Court's findings. The Court of Appeals held that the District Court erred in concluding that either party could refuse to arbitrate based on its unilateral refusal to stipulate the grievance and that the intention of the parties derived from the Agreement and bargaining history was that "the parties must jointly stipulate the grievance in any case in which either party contends, in good faith, that the grievance involves the interpretation or application of the provisions of the agreement" (*infra*, p. 17a). The Court of Appeals remanded the case to the District Court for a determination of whether the grievance involved the interpretation or application of the provisions of the agreement (*infra*, p. 17a).

REASON FOR GRANTING THE WRIT

The Holding of the Court of Appeals That a Joint Company-Union Grievance Stipulation Was Not a Mandatory Condition Precedent to Arbitration Was Contrary to the Terms of the Grievance and Arbitration Clause of the Collective Bargaining Agreement and the History of Negotiations and the Consequence of an Over-Extension and Misapplication of This Court's Ruling in the Arbitration Trilogy Cases.

This Court, in the Arbitration Trilogy [3] and in certain cases following it, has recently undertaken to define the source and boundaries of the obligation to arbitrate under collective bargaining agreements pursuant to Section 301 (a), and the respective functions of the courts on the one hand and of the arbitrators on the other in the arbitral process. The basic principle which emerged from the Arbitration Trilogy cases was that the courts restrict their determinations to, first—the existence of a contractual obligation to arbitrate, and second—the boundaries or scope of that obligation. Since each of the cases referred to contained arbitration clauses concededly binding the employer to arbitrate a general class of dispute, the decisions dwelt upon the second point, namely, the rules of construction applicable to arbitration clauses to determine whether an asserted dispute falls within the boundaries or scope of that general class. Thus, this Court ruled that unless an asserted dispute was expressly excluded from the general class, only the most forceful evidence of a purpose to exclude it from arbitration would suffice, and the courts should not

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[3] *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564; *United Steelworkers* v. *Warrior and Gulf Nav. Co.*, 363 U. S. 574; *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593.

rule on the merits of an asserted dispute under the guise of determining arbitrability.

The situation in the present case is fundamentally different from the arbitration clauses scrutinized in the Arbitration Trilogy. Here there is no agreement making arbitration of any subject mandatory. Rather, the words of the arbitration clause direct that the arbitration procedures set forth or discretionary: that is, that either party may exercise its discretion against arbitrating any particular dispute by refusing to stipulate the grievance. In the full context of the arbitration procedures of the Agreement together with the history of negotiations discussed below, the required stipulation is seen as a condition precedent to any obligation to arbitrate. The Board of Arbitration is unconditionally limited to act "only on the stipulation."

The contractual situation in the present case is similar to that posed to this Court in *Teamsters* v. *Yellow Transit Freight Lines, Inc.*, 370 U. S. 711, where this Court reversed a holding by the Tenth Circuit upholding an injunction against a labor union prohibiting violation of a no-strike clause. Justices Brennan, Douglas and Harlan noted that the contract's arbitration clause provided for no mandatory system of arbitration,[1] and concluded:

---

[1] "Settlement is first to be attempted between the employer and the local union involved and, failing adjustment, negotiated settlement is to be attempted by a joint state committee consisting of equal numbers of employer and union representatives. If a majority of that committee 'settles a dispute,' '[s]uch a decision will be final and binding on both parties.' If a joint state committee fails to settle a dispute, a negotiated settlement is then to be attempted by a joint area committee consisting of equal numbers of employer and union representatives duly elected by the various joint state committees. This is the last stage unless there is agreement at that point to submit unsettled disputes to arbitration. Obviously, either employer or union representatives are free to prevent arbitration." 370 U. S. at 712.

> "Since it is clear that the collective bargaining agreement involved in this case does not bind either party to arbitrate any dispute, I agree that no injunction should be granted." 370 U. S. at 711-12.

The rules of the *Warrior & Gulf* case were not applied or cited by these Justices for the reason that there was no agreement between the parties to arbitrate any particular issue. See also, *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238; *United Electrical, Radio & Machine Workers* v. *General Electric Co.*, 208 F. Supp. 870 (S. D. N. Y. 1962).

In misapplying the rules of construction for concededly mandatory arbitration clauses in collective bargaining agreements enunciated by this Court in the Arbitration Trilogy, the Court of Appeals ran afoul of the underlying premises of those cases stated by Mr. Justice Douglas in the following language:

> "The Congress, however, has by § 301 of the Labor-Management Relations Act assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 580, 582.

Through this misapplication of the rules of construction of concededly mandatory arbitration clauses to the question whether the agreement itself compels arbitration the Court of Appeals had unduly overextended the holdings of the Arbitration Trilogy to a point where it has converted discretionary procedures for arbitration to a com-

pulsory system in plain derogation of the only source of the obligation to arbitrate—the agreement between the parties.

The petitioner respectfully suggests that this case affords the Court an excellent and needed opportunity to delineate further the bounds of the obligation to arbitrate, and to differentiate between the rules applicable to construction of the coverage of an agreement to arbitrate and the rules applicable to a determination of whether the parties ever agreed to any system of compulsory arbitration.

A. THE AGREEMENT AND THE HISTORY OF NEGOTIATIONS DEMONSTRATE, AS FOUND BY THE DISTRICT COURT, THAT THE JOINT STIPULATION WAS A CONDITION PRECEDENT TO ARBITRATION AND THE COURT OF APPEALS' CONTRARY CONCLUSION IS IN CONFLICT WITH THE FINAL DECISION OF ANOTHER FEDERAL COURT.

The Agreement involved herein ultimately provides for a system of voluntary arbitration. The matter in dispute must not only be one "involving the interpretation or application of the provisions of the Agreement" but the parties must also be willing to "stipulate the grievance jointly in writing." These two conditions have to be met before any obligation to arbitrate a dispute ever arises. The other terms of the Agreement merely cover the details of handling an arbitration should the joint stipulation be executed.

Article XV of the Agreement starts in paragraph "a" by defining "grievance":

> "A grievance is any difference between the Company and an employee about what any part of this Agreement means or how it should be applied; or any matter directly affecting the employee as to hours of work, wages and working conditions."

Paragraph "b" of Article XV sets forth the grievance procedure from Step 1 through Step 3. The type of griev-

ance subject to arbitration is sharply limited at Step 4 as follows:

> "It is understood that arbitration will be *limited* to grievance involving the interpretation or application of the provisions of this Agreement" (emphasis added).

The Agreement then sets forth the condition precedent which, if met, gives rise to an obligation to arbitrate. The critical language of paragraph "b" of Article XV states:

> "The Company and the Union will *stipulate* the grievance *jointly* in writing and *the Board will act only on the stipulation* and will not add to nor take away the terms of this Agreement in making this decision" (emphasis added).

The choice of the words "stipulate . . . jointly" and "stipulation" clearly evidences that the parties had not bound themselves in advance to arbitrate anything. Before a stipulation can be achieved it is necessary to have an agreement upon its contents. Such an agreement was never achieved, thus no obligation to arbitrate ever arose.

This construction of the terms of the Agreement is in accord with a holding by the United States District Court for the Northern District of Illinois, in *Soap Workers* v. *Procter & Gamble Mfg. Co.*, 48 L. R. R. M. 2766 (N. D. Ill. 1960); where the contract provided that "the arbitrators shall confine their consideration to the grievance stipulated in writing jointly by the Employer and the Union, and shall neither add to nor subtract from the written provisions of the stipulation in this agreement in making a decision." The Court held that the joint stipulation provision of the contract

> "requires as an indispensable condition precedent to the authority of the arbitrators to consider any

'grievance' asserted by a party to the agreement, the execution by both parties of a joint written stipulation of the 'grievance' to which the arbitrators 'must confine their consideration'."

The Court thus refused the Union's request to require the employer to arbitrate a dispute where the employer had refused to enter into a joint stipulation.

The reasoning of the Court of Appeals in the instant case that there would be no reason to restrict arbitration to grievances involving the interpretation or application of the provisions of the agreement if either party could, in any event, evade arbitration by refusing to stipulate the grievance, is in error. As the bargaining history outlined below demonstrates, the two standards appear in the contract for the reason that as a matter of policy the Company does want to agree when the occasion arises to arbitrate any dispute which involves an interpretation or application the provisions of the Agreement, but does not want to arbitrate asserted "grievances" which do not. The requirement of a joint stipulation is necessary in order to safeguard against controversy arising over whether a particular dispute does in fact involve the interpretation or application of the provisions of the Agreement. For this reason each party has been given a veto power over whether a particular dispute may go to arbitration. Thus, both the provision for the joint stipulation and the restriction of grievances to disputes involving the interpretation or application of the provisions of the Agreement are wholly consistent with one another.

The grievance and arbitration clause of the contract involved have been the same since the respective parties negotiated their first contract in 1953. In the negotiations leading up to the present contract in 1960, the Union made a strenuous and unsuccessful attempt to delete the joint stipulation provision of the arbitration clause on the

ground that it gave the Company a veto power over whether an issue went to arbitration. Fortunately, the history of these negotiations was contemporaneously transcribed and introduced into evidence in the District Court when the present case was heard.

The Union's purpose in seeking changes in the arbitration clause was stated to be the following:

> "We . . . feel the way the arbitration clause is now written it gives the Company the absolute say in arbitration, whether anything goes to arbitration or not and we don't feel that is the purpose of the arbitration clause and I will state that we are very, very unhappy with the answers you gave us yesterday about deciding what will go to arbitration because we feel that if we think it is an interpretation of the contract and it is something that legally falls within the arbitration clause then we definitely think it should be taken to arbitration" (R. III:215:9-18).

Later in the negotiations the Union contended that the use of the word "jointly" prevented them from forcing the Company to go to arbitration on a matter where the Union could "set up an argument that it does deal with the contract and you (the Company) can set up an argument that it does not deal with the provisions of the contract." The Company representative remarked that the Union could always "set up an argument that anything does" deal with the contract, therefore in that situation the arbitration provision protected both parties from having to go to arbitration on such disputes (R. III:230:9-18). Thereafter the Company amplified its position further when it stated:

> ". . . the only time we are not willing to go to arbitration is when it falls outside the interpretation or application of the contract *and it is possible to tie a lot of things into the contract that aren't really a part of it and we are not willing to go out and arbitrate on*

all those things" (R. III:235:14-18) (emphasis added).

In the same negotiation session the Union made the following statements through its President, Burl Waits:

> "But if six months later, say we should agree to drop our joint request and let your interpretation stand and six months later we come up and we say now this is an interpretation of the contract and we want to take it to arbitration and you don't agree with us; you don't agree it falls in the category of the interpretation and we say we think it does and you say we are not going to arbitrate it, then what are we going to do" (R. III:231:13-20).

Mr. Mellinger replied for the Company:

> "Well, the only thing is and I have said this before, we have agreed to arbitrate certain things. We have not agreed to arbitrate anything beyond that and if it falls in that range then we are willing to arbitrate and we have never used the joint stipulation to stop arbitration but if it deals with something outside of this range which I am not agreeing to include in the arbitration clause, then we are not willing to arbitrate" (R. III:231:21-26; III:232:1-2).

Mr. Waits answered for the Union:

> "And you want to be the final judge on whether it falls in that category or not" (R. III:232:6-7).

Mr. Mellinger replied that either party had the same right (R. III:232:8-14).

A little later in the same negotiating session the Union withdrew its request to delete the word "jointly" and proposed instead that the following paragraph be inserted in the arbitration clause:

> "If the Company and the Union cannot agree whether the grievance involves the interpretation or application of the provisions of this agreement, a board of arbitrators will be selected to make the decision" (R. III:237:14-17).

The Union also proposed that the entire arbitration clause be deleted or that the wording of the arbitration clause at the Company's Port Ivory, New York, plant be substituted (R. III:210:6-10). In making the latter request the Union asserted that the Port Ivory clause was a much better clause than the one at Sacramento, and that Sacramento should have the same kind of arbitration provision as Port Ivory (R. III:210:13-26; III:211:1-15). The Union's recognition of the limited form of arbitration which was available at Sacramento was acknowledged again when its spokesman made the following assertions at a later session of the negotiations:

> "It [the proposed change in Art. XV] will give us for the first time an arbitration clause" (R. III:245:6-7).
>
> • • • • •
>
> "But you know yourself that actually this [word 'jointly'] is more or less ties our hands if you disagree that it [a grievance] doesn't come under any of the agreements of the contract" (R. III:259:8-10).
>
> • • • • •
>
> *"Well, you speak of talking to lawyers, we have talked to our lawyer about this thing and as far as an arbitration clause is concerned, he says it just isn't any good because it don't mean anything and that is why we are trying to change it"* (R. III:260:25-26; III:261:1-3) (emphasis added).

Finally, after additional negotiations, including further consideration of the Union's proposals to modify Article XV, the Agreement was executed without any change in that article (R. III:282:2-12; I:J(1), Art. XV).

What this bargaining history demonstrates beyond question is that while the Company was willing to commit itself in principle to the arbitration process and was willing to arbitrate grievances which in its view presented genuine questions of contract interpretation, it was reserving for itself and for the Union the right to unilaterally determine whether or not a particular grievance could be taken to arbitration. This bargaining history also shows that the Union, while not liking this state of affairs, nevertheless understood and indeed agreed to this construction of the Agreement which the Union unsuccessfully sought to change.

B. THE COURT OF APPEALS EXCEEDED ITS POWER OF REVIEW IN ITS FINDING, CONTRARY TO THAT OF THE DISTRICT COURT, THAT THE CONTRACT AND NEGOTIATIONS EVIDENCED AN UNDERSTANDING BY BOTH PARTIES THAT THE JOINT STIPULATION WAS NOT A CONDITION PRECEDENT TO ARBITRATION.

On the basis of the factual history of negotiations outlined above, the District Court concluded:

> "[T]he preliminary negotiations leading to the Agreement evidence an understanding by both parties that by this very means either party could unilaterally evade the arbitration provisions of the Agreement" (*infra*, p. 5a).

After stating that it had "carefully reviewed all of the bargaining history in the record," the Court of Appeals held:

> "[T]hat the district court erred in concluding that the parties could unilaterally evade the arbitration provisions of the agreement by the simple expedient of refusing to stipulate the grievance" (*infra*, p. 16a).

This apparently *de novo* review of the record by the Court of Appeals resulted in a clear reversal of the crucial finding of fact by the District Court in this case, i.e., the

intention of the parties as evidenced by the negotiations. Yet this reversal by the Court of Appeals was accompanied by no showing or even statement that the above-stated finding of the trial judge was so "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil procedure and *United States* v. *Gypsum*, 333 U. S. 364[5] that it should be overturned. It follows that the Court of Appeals exceeded its reviewing function under Rule 52(a).

The substituted judgment of the Court of Appeals that the negotiations showed an assurance by the Company to the Union that so long as the grievance dealt with an interpretation or application of the Agreement, the joint stipulation provision would not be used to block arbitration, demonstrates the vice which Rule 52(a) sought to correct.

The Company did give the Union good faith assurances that the Company would not block arbitration by the joint stipulation device of grievances which the Company believed involved the interpretation or application of the Agreement. The history of the negotiations shows in addition that the Company did not want the issue of whether a particular dispute inolved an interpretation or application of the Agreement to be arbitrated or litigated, but rather sought and obtained through the joint stipulation provision the discretion to refuse to arbitrate exercisable by either the Company or Union in the event either of them believed that the issue sought to be arbitrated did not involve the interpretation or application of the Agreement.

CONCLUSION

There is nothing illegal or contrary to public policy in an arbitration agreement whereby the parties provide for

[5] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been made." 333 U. S. at 395.

what is in effect an *ad hoc* determination in each case as to whether or not to proceed to arbitration, and, accordingly whereby either party may, by refusing to enter into a joint stipulation of the grievance, block arbitration after the other steps of the grievance procedure have been exhausted. Both the language of the arbitration agreement in the present case and the history of its negotiations clearly demonstrate an intent to construct a system of case-by-case discretionary arbitration rather than an advance commitment to compulsory arbitration To require arbitration in these circumstances is to require a party to submit a dispute to arbitration which he has not agreed so to submit and is thus in direct contravention of the holding of this Court in the *Warrior & Gulf* case.

It is respectfully requested that a writ of certiorari be issued as prayed to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD W. BARRETT,
JACK G. EVANS,
1200 Union Central Building,
Cincinnati 2, Ohio,
Counsel for Petitioner.

Of Counsel:
GUY FARMER,
PATTERSON, BELKNAP & FARMER,
1120 Connecticut Ave., N.W.,
Washington 6, D. C.,
HAROLD S. FREEMAN,
DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
1200 Union Central Building,
Cincinnati 2, Ohio.

April 25, 1963.

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA, NORTHERN DIVISION

(Filed April 25, 1962)

Civil No. 8241

In the Matter of the Application
of
THE INDEPENDENT SOAP WORKERS OF SACRAMENTO, CALIFORNIA, a Labor Organization, for an Order Compelling THE PROCTER & GAMBLE MANUFACTURING COMPANY, a Corporation, at its Sacramento, California, Plant to Arbitrate.

MEMORANDUM AND ORDER

In this action, Independent Soap Workers of Sacramento, California (hereinafter referred to as "Union") have applied for an order compelling Procter & Gamble Manufacturing Company (hereinafter referred to as "Company"), and particularly its Sacramento Plant, to arbitrate. The sole question presently at issue is whether arbitration shall be ordered.

A determination of the arbitrability of the grievance involved in this case must rest upon this Court's interpre-

tation of the terms of Article XV(b) of the Collective Bargaining Agreement entered into between Union and Company on August 5, 1960.

The factual basis of this action can be stated concisely. On November 19, 1960, one Norman Raiser, a member of Union and an employee of Company at its Sacramento Plant, was sent home from work by Dick Kelso, his foreman, at 11:00 a.m. This was some four hours in advance of his normal quitting time. The apparent basis for this action was an alleged inattention to his duties as a "tank farm operator," in which capacity he was at that time employed. It appears that he overfilled a tank car with certain stock of Company so that a quantity of it was lost. At the time Raiser was sent home, he was not informed, nor had he been informed prior thereto, and he did not then know, what constituted a "major offense" under the Collective Bargaining Agreement of 1960 (hereinafter referred to as "Agreement"). At that time, Raiser was not given an unsatisfactory work report, nor was he given a warning notice. He had a prior history, however, of having committed errors in the performance of his work assignments.

On November 21, 1960, he was notified to attend a meeting relative to the incident of November 19th. Present at that meeting, besides Raiser, were Burl Waits (President of Union), Fred Rose (Department Foreman), Dick Kelso (Raiser's Foreman), and Rex Chapman (Personnel Manager of Company). At the meeting, a draft of a proposed unsatisfactory work report entry for Raiser's permanent record was read, opportunity for Raiser to speak was granted, and the draft was thereupon entered on his record. The entry included a warning that future errors might lead to the imposition of discipline, including possible

suspension or termination of his employment. Raiser was then put into a general labor pool at a decreased pay rate. He was paid for the period November 19-21 during which he did not work, although he could have done so. He was, however, not notified that he would be paid until payment was actually made. Since November 21, 1960, he has made no subsequent bids for positions as a tank farm operator (The parties are in dispute as to whether he has been eligible to fill such a position.).

Union filed a grievance with Company, pursuant to the provisions of Article XV of the Agreement, over the disqualification of Raiser. Article XV deals with grievance procedure, and provides, in pertinent part, as follows:

> "If an employee has a grievance it shall be adjusted according to the following procedure.
>
> *Step 1:* The employee or his steward shall first present his grievance to his foreman or department manager.
>
> *Step 2:* If not settled, the employee or his steward will present it to the group manager.
>
> *Step 3:* If not settled, the grievance will be put in writing and taken to the Plant Manager or his representative by the Union Executive Board.
>
> *Step 4:* A grievance not adjusted by these steps may be taken to a Board of Arbitration by either party within 60 days of the initial presentation. In this event, the Company and the Union shall each select an arbitrator within 15 days after such request. The two they name shall pick a third. If they cannot agree on the third arbitrator within 10 days, they shall ask for lists of arbitrators from the American Arbitration Association from which they may select and agree on the third arbitrator.
>
> It is understood that arbitration will be limited to grievance involving the interpretation or application

of the provisions of this Agreement. The Company and the Union will stipulate the grievance jointly in writing and the Board will act only on the stipulation and will not add to nor take away from the terms of this Agreement in making this decision.

The majority decision of any 2 of the 3 arbitrators shall be final and binding on both Company and Union."

Raiser's asserted grievance was processed through Steps 1, 2 and 3 without achieving a settlement. Step 3 was completed in a meeting of the parties on December 30, 1960. At this meeting, Union orally requested arbitration of the dispute, stating that the action taken by Company was "not proper nor just." Company declined to arbitrate and also declined to enter into a joint stipulation for this purpose, basing its conclusion upon the ground that the dispute did not involve interpretation or application of any provision of the Agreement.

Union points out that nowhere in the booklet of Company rules (Union Exhibit 5) is there any indication as to what constitutes a major offense under the Agreement. Union also notes that as of the time Raiser was sent home on November 19th, he had not received an unsatisfactory work report or a warning notice, as specified by Articles XI and XII of the Agreement.

Union argues that a difference between Company and an employee about what any part of the Agreement means is a grievance which involves interpretation of the Agreement. Union also contends that by the very fact of Company's having (along with Union) processed this grievance through the initial three steps of the grievance procedure, Company is estopped to deny that a grievance here exists. It appears that Company does not deny the existence of a

grievance. Company denies only that the grievance involves an interpretation or application of the Agreement, and claims therefore that it can exercise its discretion and refuse to arbitrate, by refusing to enter a joint stipulation.

In its opening memorandum, Union has submitted some 14 points which it contends concern questions of interpretation and application of the Agreement. It appears to this Court, however, that the issues involved in this proceeding do not go beyond two. These issues are: (1) Does the action taken by Company against Norman Raiser involve a problem or interpretation or application of the Agreement; and (2) Under the arbitration provisions of the Agreement, can Company be compelled to arbitrate?

Since the Court is of the view that the last question must be answered in the negative, there is no need to reach the first question. Article XV(b) provides that the arbitrator may consider only the information provided him by a joint stipulation, and that in doing so, nothing should be added by the Board to the terms of the Agreement. In interpreting this provision, it should be noted that the preliminary negotiations leading to the Agreement evidence an understanding by both parties that by this very means, either party could unilaterally evade the arbitration provisions of the Agreement.

Particularly noteworthy is the abrupt change in language in Step 4 of Article XV(b). From terms of command, through the word "shall," in the first paragraph of that section, the Agreement turns to the use of the word "will" in the second paragraph, dealing with the joint stipulation. Such a direct and complete change, when taken with the history of the negotiations, indicates a clear intention to make the joint stipulation a condition precedent to the

continued progress of proposed arbitration, but not a required consequence of previous failures to agree. This same view was taken by the Court in *Independent Soap & Glycerine Workers* v. *Procter & Gamble Mfg. Co.* (N. D. Ill.), 46 LRRM 2766. In that case, the Court found that the provision requiring a joint stipulation was specifically intended as a condition to further proceedings, and that the Company had not breached its obligations by failing to enter into a joint stipulation.

The basic policy in favor of arbitration as a vehicle for settling labor disputes must be read in context with the fact that "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (*United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582). Company has not agreed to submit anything to arbitration in the absence of a joint stipulation, and no provision appears in the Agreement which would require a joint stipulation as a necessary consequence of the failure of Steps 1, 2 and 3 of the grievance procedure of Article XV. Although this dispute may possibly involve the precise problem with which an arbitration provision is intended to deal, the terms of this particular provision are (and obviously were intended by the negotiations to be) so weak as to render it totally nugatory. The arbitration provision being a matter of contract, this Court cannot add anything to it to give it substance.

The Collective Bargaining Agreement entered into by Union and Company contains no requirement that either one or both of the parties *must* stipulate the grievance as a mandatory consequence of the failure of Steps 1, 2 and 3 of the grievance procedure as set up in Article XV. The Agreement does, however, limit the consideration of any

arbitration board to such a joint stipulation. The arbitration clause of the Agreement is, for all practical purposes, nullified if either party elects not to enter into the required joint stipulation. Company is within its legal rights in refusing to stipulate the grievance in this case. It would be an idle act for this Court to order arbitration where, in a case such as this one, no grievance is framed by the stipulation of the parties. Accordingly, the Court will not issue an order requiring Company to arbitrate.

In view of the conclusion which the Court has reached above, all of the items of evidence on which certain rulings on admissibility were reserved, namely Union's Exhibits 3 and 4, and Company's Exhibit B, are without probative value in these proceedings. For that reason, the objection to the admission of each of these exhibits is sustained.

IT IS, THEREFORE, ORDERED that Union's petition to compel Company to arbitrate be, and it is, hereby denied.

DATED: April 25, 1962.

SHERRILL HALBERT,
United States District Judge.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18026

Feb. 15, 1963

THE INDEPENDENT SOAP WORKERS OF SACRAMENTO, CALIFORNIA,

Appellant,

v.

THE PROCTER & GAMBLE MANUFACTURING COMPANY,

Appellee.

On Appeal from the United States District Court for the Northern District of California, Northern Division

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Before: HAMLIN, JERTBERG and DUNIWAY, Circuit Judges. JERTBERG, Circuit Judge:

Appellant, The Independent Soap Workers of Sacramento, California (hereinafter "Union") is a labor organization which, under a collective bargaining contract, represents certain employees of appellee, The Procter & Gamble Manufacturing Company (hereinafter "Company"), a corporation organized and existing under the laws of the State of Ohio and authorized to do business in the State of California.

The Union appeals from an order of the district court denying its application filed under Section 301 of the

Labor-Management Relations Act of 1947 (29 U.S.C. § 185) to compel the Company to submit to arbitration a labor dispute involving one Norman Raiser (a member of the Union) in accordance with and pursuant to the collecting bargaining contract.

No question is raised on this appeal as to the jurisdiction of the district court or of this Court.

The essential facts of this case are not in dispute and may be summarized as follows:

> On or about August 5, 1960, a collective bargaining contract was entered into between the Union and the Company under which the Union became the exclusive bargaining representative of certain employees of the Company at its Sacramento plant. On November 19, 1960, one Norman Raiser, a member of the Union, and an employee of the Company at its Sacramento plant, was sent home from work by his foreman four hours in advance of his usual quitting time. The basis of this action was an alleged inattention to Raiser's duties as a "tank farm operator" in that he had overfilled a tank car with certain stock of the Company so that a quantity of it was lost. At that time Raiser was not given an unsatisfactory work report, nor was he given a warning notice. His record on the whole was good but did contain certain entries of prior errors in the performance of his work assignments. On November 21, 1960, Raiser was notified to attend a meeting relative to the incident of November 19th. There were present at the meeting the president of the Union, the department foreman, Raiser's forman, and the personnel manager of the Company. At the meeting a draft of a proposed unsatisfactory work report entry for Raiser's permanent record was read. Opportunity for Raiser to speak was granted, and the draft was entered on his record. The entry included a warning that future errors might lead to the imposition of

discipline, including possible suspension or termination of his employment. Raiser was then disqualified for the work of a "tank farm operator" and was put into a general labor pool at a decreased pay rate. Since November 21, 1960, Raiser has made no bid for position as such operator. At the hearing the president of the Union contended that Raiser had not been responsisible for at least one entry of error in the performance of his duties which appeared on his work record, and contended that Raiser's demotion was a taking away of his seniority rights and the Company was not entitled to do so under the terms of the collective bargaining contract. The Union filed a grievance with the Company, pursuant to the provisions of Article XV of the agreement, over the demotion of Raiser.

Article XV of the collective bargaining agreement, in pertinent part, provides as follows:

"ARTICLE XV
GRIEVANCE PROCEDURE"

"a. Definition of Grievance

"A grievance is any difference between the Company and an employee about what any part of this Agreement means or how it should be applied; or any matter directly affecting the employee as to hours of work, wages and working conditions.

"b. Grievance Procedure

"If an employee has a grievance it shall be adjusted according to the following procedure.

"Step 1: The employee or his steward shall first present his grievance to his foreman or department manager.

"Step 2. If not settled, the employee or his steward will present it to the group manager.

"Step 3: If not settled, the grievance will be put in writing and taken to the Plant Manager or his representative by the Union Executive Board.

"Step 4: A grievance not adjusted by these steps may be taken to a Board of Arbitration by either party within 60 days of the initial presentation. In this event, the Company and the Union shall each select an arbitrator within 15 days after such request. The two they name shall pick a third. If they cannot agree on the third arbitrator within 10 days, they shall ask for lists of arbitrators from the American Arbitration Association from which they may select and agree on the third arbitrator.

"It is understood that arbitration will be limited to grievance involving the interpretation or application of the provisions of this Agreement. The Company and the Union will stipulate the grievance jointly in writing and the Board will act only on the stipulation and will not add to nor take away from the terms of this Agreement in making this decision.

"The majority decision of any 2 of the 3 arbitrators shall be final and binding on both Company and Union."

The grievance was processed through the first three steps of the grievance procedure without settlement of the grievance. The Union demanded arbitration. The Company declined to submit the dispute to arbitration, declined to enter into a joint stipulation for that purpose, and declined to appoint an arbitrator. The Union appointed its president as its arbitrator and offered a proposed stipulation of the grievance for arbitration.

The Company takes the position that the grievance does not involve "the interpretation or application of the provisions" of the collective bargaining agreement and that it can exercise its discretion and refuse to arbitrate by declining to enter into a joint stipulation.

In its memorandum and order denying the Union's petition to compel the Company to arbitrate, the district court

held that but two issues were presented to it for determination. These issues are: (1) Does the action taken by the Company against Raiser involve a problem or interpretation or application of the agreement; and (2) Under the arbitration provisions of the agreement, can the Company be compelled to arbitrate?

Since the district court was of the view that the last question had to be answered in the negative, the court did not reach the first question.

The memorandum and order of the district court makes it crystal clear that the Union's petition to compel arbitration was not denied on the ground that the Raiser grievance did not involve the interpretation or application of the bargaining contract.

The refusal of the district court to order arbitration is based entirely on the provisions contained in Step 4 of the arbitration clause that the parties "will stipulate the grievance jointly in writing and the Board will act only on the stipulation and will not add to nor take away from the terms of this Agreement in making this decision." In the course of its memorandum the district court stated:

> "Article XV(b) provides that the arbitrator may consider only the information provided him by a joint stipulation, and that in doing so, nothing should be added by the Board to the terms of the Agreement. In interpreting this provision, it should be noted that the preliminary negotiations leading to the Agreement evidence an understanding by both parties that by this very means, either party could unilaterally evade the arbitration provisions of the Agreement.
>
> "Particularly noteworthy is the abrupt change in language in Step 4 of Article XV(b). From terms of command, through the word 'shall,' in the first paragraph of that section, the Agreement t irns to the use

of the word 'will' in the second paragraph, dealing with the joint stipulation. Such a direct and complete change, when taken with the history of the negotiations, indicates a clear intention to make the joint stipulation a condition precedent to the continued progress of proposed arbitration, but not a required consequence of previous failures to agree. . . .

"The basic policy in favor of arbitration as a vehicle for settling labor disputes must be read in context with the fact that 'arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit' (*United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582). Company has not agreed to submit anything to arbitration in the absence of a joint stipulation and no provision appears in the Agreement which would require a joint stipulation as a necessary consequence of the failure of Steps 1, 2 and 3 of the grievance procedure of Article XV. Although this dispute may possibly involve the precise problem with which an arbitration provision is intended to deal, the terms of this particular provision are (and obviously were intended to be) so weak as to render it totally nugatory. The arbitration provision being a matter of contract, this Court cannot add anything to it to give it substance.

"The Collective Bargaining Agreement entered into by Union and Company contains no requirement that either one or both of the parties *must* stipulate the grievance as a mandatory consequence of the failure of Steps 1, 2 and 3 of the grievance procedure as set up in Article XV. The Agreement does, however, limit the consideration of any arbitration board to such a joint stipulation. The arbitration clause of the Agreement is, for all practical purposes, nullified if either party elects not to enter into the required joint stipulation. Company is within its legal rights in refusing to stipulate the grievance in this case. It would be an idle act for this Court to order arbitration where, in

> a case such as this one, no grievance is framed by the stipulation of the parties. Accordingly, the Court will not issue an order requiring Company to arbitrate." (Emphasis in quoted material.)

The end result of the holding of the district court is that under the provisions of Step 4 of Article XV(b) of the contract, a grievance (as defined in Article XV(a)) "involving the interpretation or application of the provisions" of the agreement is not arbitrable unless the parties jointly stipulate the grievance in writing. In other words, the arbitration may be barred by the unilateral action of either party by refusing to stipulate.

In the view of the district court, such intention is made clear by bargaining history and the use of the word "will" in the second paragraph of Step 4 following the use of the word "shall" in the first paragraph, considered in the light of bargaining history.

The parties do not dispute the rule that words in the collective bargaining agreement are to be interpreted in the background and light of bargaining history. *Pacific Northwest Bell Telephone Company* v. *Communications Workers of America*, ... F. 2d ... (9th Cir.), No. 17645, decided November 1, 1962.

In the context in which used, we believe that no significance can be attached to the fact that the word "shall" appears in the first paragraph of Step 4 and the word "will" in the second paragraph. To us, the words, in context, are synonymous and connote words of command.

We have carefully reviewed all of the bargaining history in the record. We are aware that the arbitration clause contained in the 1953 collective bargaining contract between the parties is in the same form as the contract under

review; that dissatisfaction therewith was expressed by Union representatives in discussions of grievances with Company officials in 1957 at a time after the expiration of the 1953 contract and prior to the commencement of negotiations leading up to the contract of August 5, 1960; and that throughout the negotiations culminating in the last mentioned contract the representatives of the Union unsuccessfully endeavored to modify or eliminate the joint stipulation provision. The review of bargaining history, however, reveals that throughout the bargaining negotiations the representatives of the Company repeatedly stated to and assured the Union representatives that so long as the grievance deals with the interpertation or application of the provisions of the contract, the joint stipulation provision was not intended to and would not be used to block arbitration.

If it was the intention of the parties by the language used in Step 4 that either party could unilaterally evade the arbitration provisions by refusing to stipulate the grievance, we are unable to perceive the intention of the parties in restricting arbitration to grievances involving the interpretation or application of the provisions of the agreement.

We note that Article XVII of the contract, which relates to "STRIKES AND LOCKOUTS," provides:

> "The Union agrees that there will be no work stoppage, slowdowns, walk-outs, strikes, or any other interruption of work, and the Company agrees there will be no lockout, during the life of this Agreement, or during the processing of a grievance."

While we do not hold that the arbitration provision of the contract (Article XV) is the *quid pro quo* for the no

strike provision (Article XVII) [See *Drake Bakeries* v. *Bakery Workers*, 370 U. S. 254 (1962), footnote 7, p. 261], we believe that the inclusion in the contract of Article XVII is a factor to be considered along with the bargaining history in determining the intention of the parties in respect to the arbitration provision.

In *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* (1960), the full paragraph from which a quotation appears in the memorandum and order of the district court reads as follows:

> "The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. *An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.*" Emphasis supplied.)

In light of the record before us and applying the guiding principles laid down by the Supreme Court, we hold that the district court erred in concluding that the parties intended that either party could unilaterally evade the arbitration provisions of the agreement by the simple expedient of refusing to stipulate the grievance. In our

view, the intent of the parties derived from the agreement and the bargaining history is that the parties must jointly stipulate the grievance in any case in which either party contends, in good faith, that the grievance involves the interpretation or application of the provisions of the agreement.

The order of the district court denying the Union's petition to compel arbitration is set aside and the cause is remanded to the district court to determine whether or not the "Raiser" grievance involves the interpretation or application of the provisions of the agreement.

(Endorsed) Opinion Filed Feb. 15, 1963.

FRANK H. SCHMID, *Clerk.*

JUDGMENT

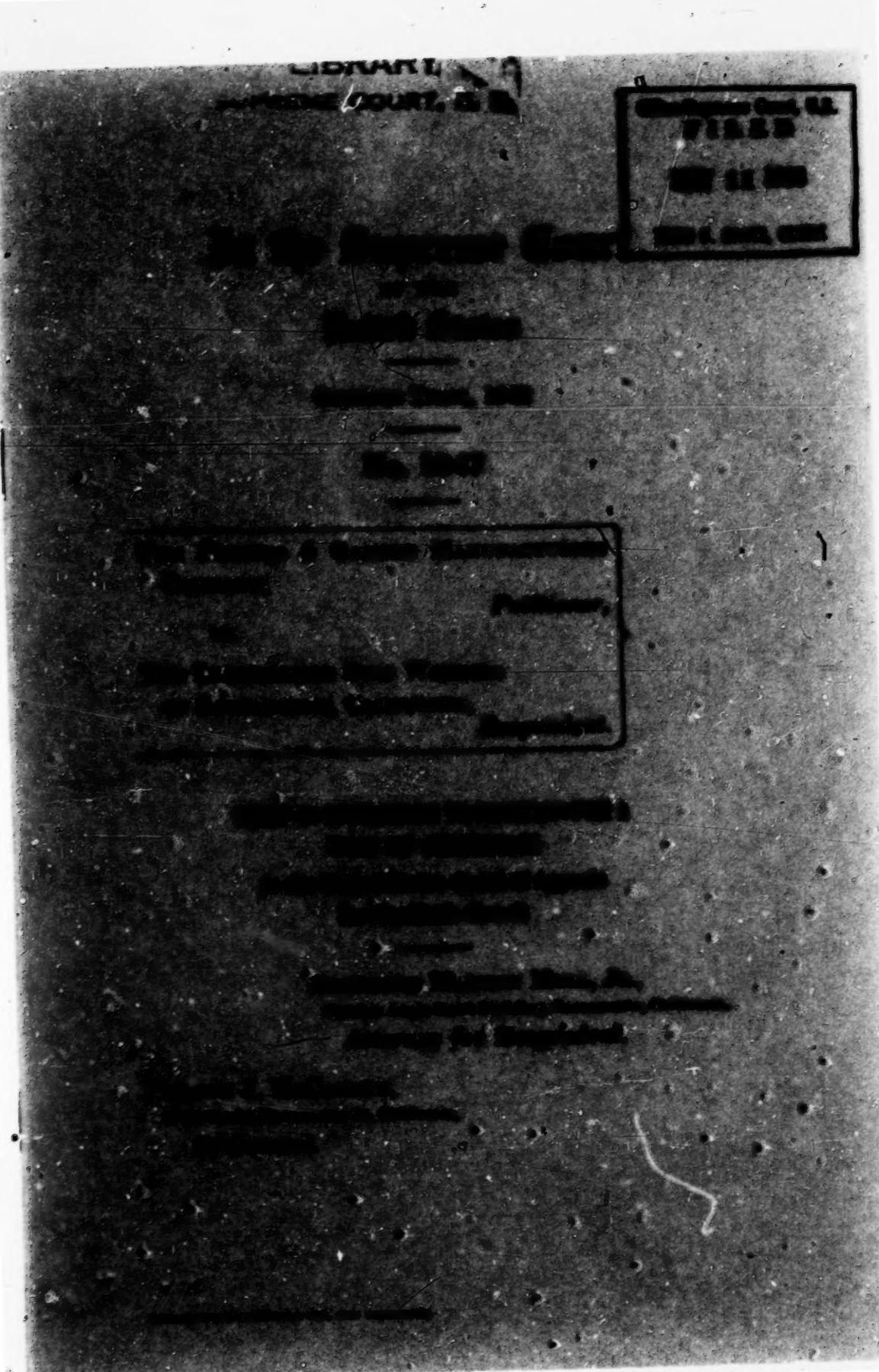
APPEAL from the United States District Court for the Northern District of California, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the order of the said District Court denying the Union's petition to compel arbitration is set aside and the cause is remanded to the District Court to determine whether or not the "Raiser" grievance involves the interpretation or application of the provisions of the agreement; with costs in favor of appellant and against appellee.

It is furhter ordered and adjudged that appellant recover against the appellee for its costs expended and have execution therefor.

Filed and entered February 15, 1963.



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 1047

THE PROCTER & GAMBLE MANUFACTURING COMPANY,
Petitioner,

vs.

THE INDEPENDENT SOAP WORKERS OF SACRAMENTO, CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Respondent prays for denial of a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered herein on February 15, 1963.

STATEMENT OF THE CASE

The arbitration provision in question, in its entirety, reads:

> "Step 4: A grievance not adjusted by these steps may be taken to a Board of Arbitration by either party within 60 days of the initial presentation. In this event, the Company and the Union shall each select an arbitrator within 15 days after such request. The two they name shall pick a third. If they cannot agree on the third arbitrator within 10 days, they shall ask for lists of arbitrators from the American Arbitration Association from which they may select and agree on the third arbitrator.
>
> It is understood that arbitration will be limited to grievance involving the interpretation or application of the provisions of this Agreement. The Company and the Union will stipulate the grievance jointly in writing and the Board will act only on the stipulation and will not add to nor take away from the terms of this Agreement in making this decision.
>
> The majority decision of any 2 of the 3 arbitrators shall be final and binding on both Company and Union."

The trial court found and held that the parties by the arbitration provision and the bargaining history intended that either party could unilaterally refuse to jointly stipulate any grievance without regard to whether a grievance did, or did not, involve interpretation or application of the provisions of the agreement. The trial Court did not decide nor determine whether the Norman Raiser grievance involves a prob-

lem of interpretation or application of the provisions of the agreement. The trial court found it unnecessary to reach such question.

Thus, by the holding of the trial court, neither party under the arbitration provisions is bound to arbitrate anything.

The trial court did not apply the proper test to the evidence. By the evidence, the trial court, in denying Union's request for order to arbitrate, could not have said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute; and, particularly, when doubts should be resolved in favor of coverage.

As the Court of Appeals held:

> "If it was the intention of the parties by the language used in Step 4 that either party could unilaterally evade the arbitration provisions by refusing to stipulate the grievance, we are unable to perceive the intention of the parties in restricting arbitration to grievances involving the interpretation or application of the provisions of the agreement."

Accordingly, the Court of Appeals set aside the order of the District Court denying Union's petition to compel arbitration and remanded to determine whether the "Raiser" grievance involves the interpretation or application of the provisions of the agreement.

QUESTION NO. 1

Petitioner seeks to make an incomplete quotation from *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 580, into a postulate which petitioner frames, asserting that the case at hand involves an important and unresolved aspect of such postulate. The full paragraph from *United Steelworkers v. Warrior & Gulf Navigation Co.*, supra (1960), is the following:

> "The Congress, however, has by Sec. 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under Sec. 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. *An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.*" (Emphasis supplied.)

Petitioner cites *Teamsters v. Yellow Transit Freight Lines, Inc.*, 370 U.S. 711 as being a similar contractual

situation. As taken from the report, the following is the pertinent contract provision in that case:

> "(d) Deadlocked cases may be submitted to umpire handling if a majority of the Joint Area Committee determines to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse."

Petitioner cites *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, as supporting authority for petitioner. The question involved whether the employer was bound to arbitrate its claim for damages against the union for breach of an undertaking not to strike. The arbitration article in question in that case "precludes arbitration boards from considering any matters other than employee grievances."

Petitioner cites *United Electrical, Radio & Machine Workers v. General Electric Co.*, 208 F. Supp. 870 (S.D.N.Y. 1962), as further supporting authority for petitioner. The language of the arbitration provisions in that case bespoke ". . . if the parties agree to arbitrate . . .". The holding of the case is authority for the proposition, namely: "The law is clear that where the language of the contract is ambiguous, the court can look to such extrinsic evidence as the parties' conduct, the statements of its representatives, and past practice to aid in interpretation."

QUESTION NO. 2

Petitioner has failed to fairly quote from the bargaining history in evidence all that which the Court of Appeals considered.

It seems self-evident that Union did not intentionally bargain away (unconditionally) its right to strike to obtain an arbitration clause the Company can unilaterally evade at will in each and every instance.

If the parties understood that either could unilaterally evade the arbitration provisions of the Agreement at will (as the trial Court finds), what then was the significance of their understanding limiting arbitration to grievance involving the interpretation or application of the Agreement?

The following excerpts are extracted from the certified record *to emphasize that the bargaining parties intended that limiting arbitration to grievance involving the interpretation or application of the Agreement should signify something meaningful, particularly that such restriction was intended to mitigate against an understanding that either party could unilaterally evade the arbitration provisions of the Agreement at will in any case by the simple device of refusing to stipulate the grievance jointly in writing.*

Each and all of the following quotations are statements made *by Company representatives* at the negotiations:

"Mr. Mellinger. This isn't in here for the purpose of blocking arbitration at all. This is simply

in here so that together we define what the problem to take to the arbitrator is. As long as that problem has to do with the specific conditions set up in the contract, we simply follow the contract and agree to stipulate it jointly and then take it on to arbitration." (R.III:202:3-9.)

"Mr. Mellinger. That is not it at all. This is simply in there so when we go to arbitration that we together define what the problem is for the arbitrator.

The provision says that, 'The Company and the Union will stipulate the grievance jointly in writing and the Board will act only on the stipulation and will not add to nor take away from the terms of this agreement in making this decision.'

That is just what I have been saying, we are willing to arbitrate things according to the arbitration clause here but we are not willing to broaden it." (R.III:207:17 to 208:1.)

"Mr. Mellinger. All this does is say we must stipulate together what the problem is." (R.III: 209:16-17.)

"Mr. Mellinger. You are welcome to your opinion but what I am saying this thing does is simply say we will stipulate what the problem is together." (R. III:209:24-26.)

"Mr. Mellinger. That is the way you feel about it because you say you do and I believe what you say but this thing simply says that the Company and the Union will stipulate the grievance jointly in writing." (R.III:212:19-22.)

"R" references are to the volume, page and where necessary the line of the certified record.

"Mr. Mellinger. Well, it has not been used that way by either the Union or the Company." (R.III:213:7-8.)

"Mr. Mellinger. Burl, I thought you certainly expressed your viewpoint very nicely there. Arbitration in any contract is a matter of the Union and Management agreeing that there are certain things that we are willing to give to a board of arbitration to arbitrate when we can't agree on it.

Now, we set up our clause, that means the Union and Management set up the clause that we have in our contract, we agreed that it should be restricted to the interpretation of the articles of the agreement. Whatever the things that we differ on strictly have to do with them, then the Company is not going to use this joint stipulation in any way to block the arbitration.

The purpose of this joint stipulation is so what we go to the arbitrator to arbitrate on is mutually agreed as the grievance but if what we think is the grievance is not an interpretation of an agreement in the contract then by the very first part of that paragraph it is not arbitrable and this is the thing that will restrict arbitration and not the joint stipulation.

Now, I am not willing from anything I have heard to agree to broaden the area of the arbitration beyond the interpretation of the agreements in the contract and I don't think you would, for your own protection, to do that, so that all I can do is assure you that the requirement that the arbitration deal with the interpretation of the aricles of the contract is the thing that is vital, this is the thing we define as one of two stipulations and if it does and we can agree

on the grievance then there should be no problem in that and we will never use this joint stipulation as a block to your taking something to arbitration.

In fact, we have been very helpful in getting the proper things into the joint stipulation in the cases where we have asked to arbitrate an interpretation of the contract.

I really don't think for your protection and for ours that we want to broaden the area of arbitration." (R.III:216:26 to 218:8.)

"Mr. Mellinger. *Well, I have tried to give you all the assurances that I can that this is not in there for the purpose of blocking arbitration and as long as the grievance deals with the interpretation of the contract they we have never and don't intend to use this joint stipulation to block it.*" (Emphasis added.) (R.III:221:17-22.)

"Mr. Mellinger. *You are saying it deals with the interpretation or application of the provisions of this agreement and if it does we never have and don't intend to use the joint stipulation as a block to your taking it to arbitration.*" (Emphasis added.) (R. III:222:12-15.)

"Mr. Mellinger. *We never have and don't intend to. The only time this thing is restrictive is when it doesn't deal with the interpretation and application of the agreement and that is the very first sentence in that paragraph and the second sentence is about jointly stipulating.*" (Emphasis added.) (R.III:222:18-22.)

"Mr. Mellinger. The thing that both these examples deal with is the first sentence which says, 'It is understood that arbitration will be

limited to grievances involving interpretation or application of the provisions of this agreement.' None of them have to do with the joint stipulation." (R.III:225:7-11.)

"Mr. Mellinger. *We are willing to entertain a proposal on your part to take it out but I don't agree with what you are saying because the only reason you can't take it to arbitration is that it doesn't deal with the interpretation or application of the provisions of the contract.*" (Emphasis added.) (R.III:230:4-8.)

"Mr. Mellinger. Bargaining has to do with what we are doing now, bargaining a contract, and I expect you are bargaining in good faith." (R.III:230:23-25.)

"Mr. Mellinger. *Well, the only thing is and I have said this before, we have agreed to arbitrate certain things. We have not agreed to arbitrate anything beyond that and if it falls in that range then we are willing to arbitrate and we have never used the joint stipulation to stop arbitration but if it deals with something outside of this range which I am not agreeing to include in the arbitration clause, then we are not willing to arbitrate. However, the word 'jointly' isn't the reason we are not, the reason we are not is that it doesn't involve the interpretation or application of a provision of the agreement.*" (Emphasis added.) (R. III:231:21.)

"Mr. Mellinger. If you are talking interpretation or application of the contract we have never blocked it." (R.III:234:22-23.)

"Mr. Mellinger. If we are truly talking about an application or interpretation of the contract

then we would never block the arbitration by this joint stipulation.

Now, the only time we are not willing to go to arbitration is when it falls outside the interpretation or application of the contract and it is possible to tie a lot of things into the contract that aren't really a part of it and we are not willing to go out and arbitrate on all those things." (R. III:235:11-18.)

"Mr. Mellinger. You have an arbitration clause, Burl, and in it we agree we will arbitrate the interpretation and application of this agreement and we have never failed to do that." (R. III:245:8-11.)

"Mr. Mellinger. You and I have agreed that we are willing to arbitrate the interpretation and provisions of this contract, right?" (R.III:248: 5-7.)

"Mr. Mellinger. Now, we are not going to violate the contract and a part of the contract says that we are willing to arbitrate the interpretation and application of the agreement and we are not going to violate that no more than we are going to violate anything else." (R.III: 248:14-18.)

"Mr. Mellinger. *Well, we will never use the word 'jointly' to block any arbitration that has to do with the provisions or interpretation or provisions of the contract.*" (Emphasis added.) (R. III:249:1-3.)

"Mr. Mellinger. Because that stipulation there is simply a matter of us getting together and defining the grievance." (R.III:249:7-8.)

"Mr. Mellinger. That is right. If it is actually an interpretation or application of the agreement we will arbitrate." (R.III:249:17-19.)

"Mr. Mellinger. That is for your protection and my protection and it simply says we should get together and define mutually what the grievance is." (R.III:259:5-8.)

"Mr. Mellinger. I don't see what the word 'jointly' has to do with the point you are making now of having something to do with the interpretation or application of a provision of the contract." (R.III:259:16-19.)

"Mr. Melinger. That doesn't have anything to do with stipulating it mutually or jointly." (R. III:259:22-23.)

"Mr. Mellinger. *The stipulation jointly is simply a joint stipulation of what the grievance is*" (Emphasis added.) (R.III:259:26 to 260:1.)

"Mr. Mellinger. That stipulation, in order to be arbitrable, has to be an interpretation of an application or provision of the contract." (R. III:260:3-5.)

"Mr. Mellinger. The fact it is stipulated jointly doesn't make it or not make it an interpretation or application of a provision of the contract." (R.III:260:7-9.)

"Mr. Mellinger. I think it means something, it means if there is a disagreement on one of the provisions or the application of the contract we are willing to go to arbitration with it. That is what it means and that is what we intended it to mean and that is what it will provide.

It does not provide unlimited arbitration in any manner, if that is what your lawyer was

referring to, he is right, but as far as providing arbitration for the application or interpretation of this contract, it does that and it has always done that. The other Unions around the circuit have used it for that and we have never refused that." (R.III:261:4-14.)

"Mr. Mellinger. We have never refused to arbitrate anything that is an interpretation or application of a provision of the contract, but we have agreed to do it and just like the rest of the provisions we aren't about to any more violate this clause than any other clause of the contract." (R.III:261:16-20.)

"Mr. Mellinger. If it has to do with an interpretation or application of a provision of this contract and we cannot agree on it, then we mutually stipulate what the grievance is and we select a board of arbitration to submit it to. The board hears both sides and according to the contract the majority decision of any two of the three arbitrators shall be final and binding on both the Company and the Union." (R. III:262:3-9.)

"Mr. Mellinger. If we mutually agree this is an interpretation or application of the contract then what we do is sit down and mutually stipulate we cannot agree whether or not to pay this man and so forth and then we select a board of arbitrators and it goes to arbitration.

We have never refused to arbitrate anything that is a part of the interpretation or application of the contract, just like we won't violate any other provision of the contract. We just don't fail to abide by the provisions of the contract. It is perfectly possible there will be differences

of opinion of interpretation of this contract and, if there are, and it is truly an intepretation of the contract we are talking about, as our clause calls for, we have never stood in the way of arbitration." (R.III:263:11-24.)

"Mr. Mellinger. All I am trying to say is that I am willing to abide by the contract. The contract calls for arbitration of an interpretation or application of a provision of the contract and I am willing to abide by it. I am always willing to abide by it and I always expect to be, but I am not willing to broaden it." (R.III:264:18-23.)

"Mr. Mellinger. John, if it falls within the interpretation and application of a provision of the contract and we agree it does, then we simply state the problem and take it to arbitration." (R.III:268:11-14.)

"Mr. Mellinger. You have every means of forcing us to live up to the contract, Burl. We have agreed that we will live up to the terms of the contract and by the terms of the contract if there is a disagreement on the interpretation or application of a provision of the contract, that it it will go to arbitration. We have agreed to that and we will abide by it." (R.III:279:12-18.)

"Mr. Mellinger. *No Clarence, we can certainly disagree on the interpretation of some provision of the contract and can mutually stipulate that we disagree on it and send it to arbitration. That isn't anything that is difficult.*" (Emphasis added.) (R.III:280:1-4.)

"Mr. Mellinger. We have agreed contractually to arbitrate any disagreement of any provision or application of the terms of this contract. We

have agreed contractually to do it and we will abide by that contract." (R.III:280:7-10.)

"Mr. Mellinger. Well, let me say, Burl, I am very impressed with what you have suggested here, I think we are very close to a contract.

I would like to look at it in detail and why don't we take a short recess. Even though it is close to our closing time we might be able to come back to you this afternoon." (R.III:283. 2-7.)

Petitioner cites *Soap Workers v. Procter & Gamble Mfg. Co.*, 48 L.R.R.M. 2766 (N.D. Ill. April 29, 1960). The published opinion, while based on stipulated documents and documentary exhibits, does not set forth the same so that determination as to what the bargaining history actually was can be referred to for comparison. It is significant that that decision was rendered prior to *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574. Petitioner has neglected, in this regard, to bring attention to two cases, both decided in 1962, against Petitioner, which mitigate strongly against Petitioner's contentions herein, namely:

Procter & Gamble Ind. Union of Port Ivory v. Procter & Gamble Manufacturing Company, 298 F. 2d 644; and,

Procter & Gamble Ind. Union of Port Ivory v. Procter & Gamble Manufacturing Company, 298 F. 2d 647.

QUESTION NO. 3

Petitioner raises the "clearly erroneous" question under Rule 52(a), Rules of Civil Procedure, and cites *United States v. Gypsum*, 333 U.S. 364. Following is a quote from that decision which seems apt.

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The cause at hand should not be reviewed by the Supreme Court because:

(1) Petitioner has not shown that there is an important question of Federal law which has not been, but should be, settled by this Court;

(2) Petitioner has not shown that the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court;

(3) Petitioner has not shown any unusual departure from judicial proceedings in the courts below as to call for an exercise of this Court's power of supervision.

CONCLUSION

Petitioner having failed to show why the cause should be reviewed by the Supreme Court of the United States, Respondent respectfully requests that the request for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

Dated, Sacramento, California,
May 3, 1963.

Respectfully submitted,
ARCHIBALD MARISON MULL, JR.,
Attorney for Respondent.

PATRICK J. MCCARTHY,
Of Counsel.